Supreme Court, U.S.
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No. 92-957

In The

Supreme Court of The United States

October Term, 1992

GERALD J. GARNER,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner afforded Due Process?

2. Did OCC withhold relevant evidence or defy Petitioner's subpoena?

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RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

This brief is submitted in opposition to the petitioner's application for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated February 10, 1992 which confirmed the Report of the Special Referee and disbarred petitioner. Matter of Garner, 176 A.D.2d 26, 580 N.Y.S.2d 59 (2nd Dept. 1992). The Court of Appeals of the State of New York, by order dated September 17, 1992, dismissed petitioner's appeal as of right, upon the ground that the appeal presented no substantial constitutional question

directly involved, and denied petitioner's alternative motion for leave to appeal. Matter of Garner, 80 N.Y.2d 917 (1992).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C Section 1257(a).

STATEMENT OF THE CASE

Respondent was charged with filing a false written statement, by filing or causing to be filed with the Office of the Controller of the Currency, an agency of the U.S Government, two confidential, biographical and financial reports in which he was asked to provide information regarding "each disciplinary proceeding or action of which you, are or have been, the subject." At the time these reports were filed, respondent was the subject of a pending disciplinary proceeding which resulted later in his suspension from the practice of law. Matter of Garner, 103 A.D.2d 380, 480 N.Y.S.2d 127 (2nd Dept. 1984). In each of the reports respondent answered falsely, and signed the reports which contained certifications that the reports has been carefully examined and were correct and complete, and acknowledging that any misrepresentation of admission of a material fact constituted a fraud in the inducement and was grounds for a denial of a certificate authorizing the commencement of banking business as well as subjecting him to other legal sanctions. The Special Referee appointed to hear and report by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department found that both charges had been proved. The Supreme Court of the State of New York, Appellate Division, Second Judicial Department, which had the benefit of the entire record to review, by order dated February 10, 1992, sustained the report of the Special

Referee and disbarred petitioner [Matter of Garner, 176 A.D.2d 26, 580 N.Y.S.2d 59 (2nd Dept. 1992)], who had been represented by counsel and afforded a full evidentiary hearing.

Petitioner made a motion to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department seeking leave to reargue his opposition to Respondent's motion to confirm the report of the special referee. By order dated June 18, 1992, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, denied the motion in its entirety. Matter of Garner, _ A.D.2d _ , _ N.Y.S.2d _ (2nd Dept.1992).

Thereafter, the Court of Appeals of the State of New York dismissed petitioner's appeal as of right, upon the ground that the appeal presented no substantial constitutional question involved, and denied petitioner's alternative motion for leave to appeal by order dated September 17, 1992. Matter of Garner, 80 N.Y.2d 917 (1992).

REASONS FOR DENYING THE WRIT

I.

Petitioner has been afforded due process.

Petitioner's claim on this petition, as well as in his motion to reargue in the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, and in his motion to appeal as of right or his alternative motion for leave to appeal in the Court of Appeals of the State of New York is that he was denied due process of law in the conduct of the hearing. The gravamen of his argument is that he was denied the right of cross-examination by the admission of testimony of Donald Lamson, from the office

of the Comptroller of the Currency (OCC), at the hearing, and of compulsory process by the OCC's "refusal" to comply with a state court subpoena. He maintains that Respondent's case depended on the testimony of Mr Lamson, who, he claims, testified freely on direct examination, but refused to answer on cross-examination. Respondent takes exception to this characterization of the witness' testimony, as well as Petitioner's reliance on its importance in support of his due process argument.

To the contrary, Respondent's case was not dependent on the testimony of Donald Lamson. As Special Referee, Bernard Richland so succinctly described in his report, the documents admitted into evidence and "admittedly submitted by respondent to the United States Comptroller of the Currency and the uncontroverted record of the 1981 disciplinary proceeding, taken together, constitute prima facie proof of . . ." the charges (6a).

Petitioner did not deny submitting the documents, and the existence of the previous disciplinary proceeding was also uncontroverted. Thus, the charges could have been sustained on the basis of documents alone. However, because of the existence of multiple copies of the 1984 OCC filing by Petitioner which contained slight differences, Petitioner's counsel raised an issue about the authenticity of the certified documents submitted in Respondent's case-in-chief (Tr. 75-83, 94 October 29, 1990).

Thereafter at the direction of Hon. Howard Miller, the former Special Referee in this matter, in order to protect Petitioner's due process rights, counsel for Respondent undertook to obtain certified copies of all documents submitted by Petitioner to the OCC. The explanation given to counsel by officials at the OCC for the existence of multiple copies appeared to be relevant to the proceedings in

light of the fact that Petitioner had raised this issue, and, therefore, counsel to Respondent made a formal request pursuant to OCC regulations that the OCC provide a witness at the hearing to explain the existence of these copies (12a-13a). The OCC also agreed to make available to all parties, for inspection in their offices in Washington, D.C., all original documents not deemed privileged or confidential.

Furthermore, the purpose of the testimony by OCC's representative was made clear at the hearing (Tr. 91 et seq. April 12, 1991). Mr. Lamson was able to clarify for the Special Referee the fact that submissions of the documents were made to more than one regional or district office of the OCC, thus explaining the existence of multiple copies, and was able to explain markings on the documents which showed in which office they were received. He also provided background information relevant to the charter and application process for national banks in accordance with Respondent's request and his authorization to testify.

Clearly then, Respondent's case was not even primarily dependent on Mr. Lamson's testimony as alleged by Petitioner. His testimony was merely ancillary and was intended to explain certain minor discrepancies in the documents which Petitioner never denied submitting.

Nor can Petitioner claim that his right to cross-examination was violated by the restrictions placed on Mr. Lamson's testimony pursuant to the Comptroller's regulations.

Petitioner had the right, and the opportunity, to make a formal request to the OCC, as Respondent did, for whatever testimony he deemed relevant to his case. The record is clear, however, that he failed to do so. (Tr. 137-138 April 12, 1991).

The very regulations which petitioner attempted to use in the course of the hearing as a shield in claiming that the documents admitted in evidence were illegally released by the Comptroller, he chose to ignore when confronted with their application in connection with Mr. Lamson's testimony. The witness made it abundantly clear that his testimony was limited by his letter of authorization from the OCC, under the OCC's regulations. 12 Code of Federal Regulations Section 4.19.

II.

OCC did not withhold relevant evidence or defy Petitioner's subpoena.

Petitioner alleges that the OCC "refused" to comply with a subpoena duces tecum served on it by Petitioner's counsel. 12 Code of Federal Regulations Section 4.19 further clarifies the OCC's position, as stated by Mr. Lamson at the hearing and as supported by case law, that the agency was not subject to a state subpoena. Yet petitioner persisted in claiming that his rights had been violated by OCC's "refusal" to comply with his subpoena.

Under the doctrine of sovereign immunity and as a general rule of Federal Law, Federal Agencies and their employees are not subject to state court subpoena power. Sharon Lease Oil Co., et al., v. Federal Energy Regulatory Commission, 691 F. Supp. 381 (Dist. of Columbia 1988); Environmental Enterprises, Inc. v United States Environmental Protection Agency, 664 F. Supp. 585 (Dist. of Columbia 1987). The same rule has been held applicable in instances in which the Federal agency in question has promulgated internal regulations regarding the release of documents and prohibiting its employees from testifying, as in the instant case. United States ex res. Touhy v Ragen, 340

U.S. 462 (1951).

The cases suggest that, when feasible, the agency cooperate with the state courts in carrying out their functions by producing certified copies of documents or otherwise assisting them. In the instant case, the OCC has done that and has allowed an employee to testify when a request was made by Respondent in conformity with the Comptroller's regulations.

In light of the OCC's cooperation with the Court and with the parties by providing the documents for inspection, and by their prompt reply to counsel for Respondent's requests for re-certification of the documents and for a witness to testify, it is patently clear that if Petitioner had simply followed the Comptroller's own regulations the problem he now complains of could have been obviated.

Counsel for Petitioner conceded in his affirmation in opposition to the motion to confirm the referee's report that counsel for Respondent had informed him that a witness from OCC would appear to testify at the hearing and would bring the documents with him. There is no evidence that Petitioner's counsel took any further steps to "enforce" the subpoena, other than a belated letter sent to OCC a few days before the hearing, and more than four months after the subpoena was issued (14a).

It has been, and continues to be, Respondent's position that the OCC did comply with Petitioner's subpoena. The addendum to the subpoena requests originals of Petitioner's 1984 and 1983 filings with the OCC as well as "Original correspondence, memoranda, interview notes and any other documents pertaining to the filing of the two confidential biographical and financial reports. . . "

The files produced at the hearing by Mr. Lamson were voluminous, and included the items referred to in Petitioner's addendum to his subpoena. Special Referee Richland allowed Petitioner's counsel to examine these documents and to use them for purposes of cross-examination without marking them as exhibits. (Tr. 66-69 April 12, 1991). Petitioner cannot claim a due process violation for his failure to avail himself of the opportunity afforded by OCC to examine the documents in their offices, and thereafter to request certified copies of documents they wish to introduce, or to provide a witness to testify in accordance with the Comptroller's regulations.

In sum, Petitioner has presented no question of law which merits review by this Court. The Petition for a Writ of Certiorari to the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York should be denied. The issues raised herein were fully briefed in the proceedings below and in Respondent's Motion to Confirm the Report of the Special Referee, Reply Affirmation, and Memorandum of Law, all of which are a part of the record. Respondent respectfully refers the Court to those documents.

CONCLUSION

For the reasons stated herein, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Grievance Committee for the
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Andrew L. Siegel
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